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IN THE

Supreme Court of the United States

October Term, 1983

JOHN MARIO EBOLI and ANTHONY DE BIASI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was the petitioner Eboli denied due process of law in a prosecution pursuant to 15 U.S.C. 1644(a) when there was no proof adduced at trial that: (a) he knowingly used the credit cards; (b) engaged in any transaction aggregating $1,000 or more; (c) engaged in any transaction whatsoever; (d) in a transaction affecting interstate commerce or even had knowledge as to the amount available for use on the cards?

2. Were the petitioners' due process rights violated in a prosecution pursuant to 18 U.S.C. 1014 when they were convicted on the basis of using credit card slips when such slips do not constitute one of the documents listed in the statute?

3. Was the petitioner De Biasi denied due process of law in a prosecution pursuant to 18 U.S.C. 1343 when there was no proof adduced at trial that he knew or could have reasonably foreseen that an authorization telephone call would be made which would precipitate an interstate wire communication.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983
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JOHN MARIO EBOLI and ANTHONY DE BIASI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, ANTHONY DE BIASI and JOHN MARIO EBOLI, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 5, 1983.

OPINION BELOW

The Court of Appeals entered its Memorandum decision affirming the petitioners' judgments of conviction entered on February 7, 1983 in the United States District Court for the Eastern District of New York. (Mischler, J.) A copy of the Memorandum is attached as Appendix A.

The Court denied the petitioners' petition for rehearing and suggestion for rehearing *en banc* on

August 25, 1983. A copy of the order is attached as Appendix B.

The Court granted the petitioners application seeking a stay of the mandate pursuant to FRAP 41(b) pending application for a writ of certiorari to this Court on September 6, 1983. A copy of the order is attached as Appendix C.

JURISDICTION

On July 5, 1983 the Court of Appeals entered judgment affirming the petitioners' judgments of conviction as aforesaid. (See Appendix A) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).*

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> Nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

On July 5, 1983, a panel of the Second Circuit Court of Appeals (Kaufman, Pratt and Gibson) affirmed the convictions of John Mario Eboli for 18 violations of 15 U.S.C. 1644(a), and one violation of 18 U.S.C. 371; and also affirmed the conviction

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*Both of the defendants in the criminal prosecution are joining in the within petition for certiorari pursuant to Rule 19.4 of this Court.

of Anthony De Biasi of two violations of 18 U.S.C. 1343, and one violation of 18 U.S.C. 371. A timely petition for rehearing pursuant to FRAP 35(a)(b) and 40 was filed on or about July 19, 1983, and the petition was denied on August 25, 1983 by the Second Circuit. (See Appendix B)

A timely application for a stay of the mandate pursuant to FRAP 41(b) was thereafter made and the application was granted on September 6, 1983 by the Second Circuit Court. (See Appendix C).

It is submitted that the Second Circuit Court of Appeals has decided important questions of federal law when interpreting 15 U.S.C. 1644(a), 18 U.S.C. 1343, and 18 U.S.C. 1014 which have not been but should be settled by this Court.

REASONS FOR GRANTING THE WRIT

I. WHERE THE GOVERNMENT FAILS TO SUSTAIN ITS BURDEN OF PROVING THAT THE PETITIONER EBOLI KNOWINGLY USED THE CREDIT CARDS, ENGAGED IN TRANSACTIONS AGGREGATING $1,000 OR MORE, OR IN ANY TRANSACTIONS WHATSOEVER, OR IN A TRANSACTION AFFECTING INTERSTATE COMMERCE, THE PETITIONERS' CONVICTION PURSUANT TO THAT STATUTE VIOLATES HIS DUE PROCESS RIGHTS.

The statute pursuant to which the petitioner Eboli was indicted, convicted and sentenced, reads as follows:

"§1644. Fraudulent use of credit cards; penalties

Use, attempt or conspiracy to use card in transaction affecting interstate or foreign commerce

> (a) Whoever knowingly in a transaction affecting interstate or foreign commerce, uses or attempts or conspires to use any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain money, goods, services, or anything else of value which within any one-year period has a value aggregating $1,000 or more."

Criminal liability under this section is proven by establishing the following elements beyond a reasonable doubt: (1) the defendant's knowing use; (2) in a transaction affecting interstate or foreign commerce; (3) a lost, stolen or fraudulently obtained credit card; (4) to obtain more than $1000 during a one year period. [*U.S. v. Lomax*, 358 F.2d 582 (10th Cir. 1979); *U.S. v. Helgesen*, 513 F.Supp. 209 (E.D.N.Y. 1981)]

In arguing before the Second Circuit Court of Appeals, Eboli contended that the government had failed to prove a number of these elements including the "knowing use" of a counterfeit credit card and, in fact, the government stipulated to the fact that the credit cards which were the subject of the prosecution for the alleged violation of this statute were never used. (1578)*

Moreover, the existence of an intent (or *mens rea*) is an essential element for criminal liability so that the government had the burden of establishing that a

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*The petitioners have requested that the clerk of the Second Circuit Court of Appeals certify the record and transmit it to this Court since a review of that record is essential to a proper understanding of the case by this Court. (See Rule 19.1) The numbers in parenthesis refer to the corresponding pages in the Appendix.

culpable defendant must have intended to obtain more than $1000 in a transaction during a one year period. [cf. *U.S. v. Byrd*, 352 F.2d 570 (2d Cir. 1965)] Since the testimony established that Eboli could not have known that $1000 or more was available through the use of any of these cards, he could not therefore have intended to violate the statute. (185, 217-218)

In addition, since the evidence established that Eboli did nothing more than merely possess the credit cards, he did not knowingly engage in either a "transaction" or a "transaction affecting interstate commerce". A transaction must, of course, consist of an act or agreement or several acts or agreements having some connection with each other in which more than one person is concerned and mere possession, by itself, does not involve such an agreement. [cf. *U.S. v. Alessi*, 638 F.2d 466 (2d Cir. 1980)]

Eboli argued further proper interpretation of this statute requires a finding that it was designed to preclude the improper use of a credit card in a singular transaction involving $1000 or more. (See 1 U.S.C. 1) Once Congress amended the statute in 1974 reducing the monetary threshold from $5000 to $1000, it maintained the singular rather than plural language ("credit card" and "transaction") and without further language, either in the statute itself or the legislative notes establishing a jurisdictional threshold, Congress impliedly intended to preclude the improper use of a credit card in a singular transaction involving $1000 or more. While Congress clearly intended to expand the scope of the statute for purposes of a Federal prosecution, it nevertheless did not contemplate the broad scope contemplated by the Second Circuit Court of Appeals in its decision herein.

The government argued that it need not prove that Eboli had knowledge of the amount of credit available or a specific intent that it be used to obtain a particular amount of money in a transaction affecting interstate commerce but argued that the monetary threshold is a "solely jurisdictional requirement." As such, the government submitted that it need only prove that Eboli entered in a conspiracy which had as an object the use of each credit card and that its use would "necessarily affect interstate commerce." The government wrote as follows:

> "In addition to a paucity of legislative history, there have been relatively few cases construing 15 U.S.C. §1644(a), and *none* that we could find involved exclusively a charge of conspiracy under the statute. Instead, each of the cases involved the actual use of a lost, stolen, counterfeit or fraudulently obtained card, and the actual obtention of a specific amount of money." (Emphasis added) [See Appellee's Br., 16-17]

Further, the government argued that nothing in the text of the statute, "its performance, its scant legislative history ... indicates that either the interstate commerce requirement or the monetary limit serves other than a jurisdictional function." [See Appellee's Br., 19] Of course, the government did not acknowledge that nothing in the text or otherwise would suggest that it serves a jurisdictional purpose either.

Lastly, the government argued that the concept of criminal intent does not require that the defendant understand both the nature of his act and its consequence. In acknowledging that the statute is "somewhat unusual in that it incorporates a conspiratorial and substantive offense within the same

statute," the government thereby reasoned that knowledge (or *scienter*) is "irrelevant" to "questions of responsibility for conspiracy to commit . . ." the offense. [See Appellee's Br., 20-21). The government did not explain how the knowledge requirement could be obviated in this "unusual" statute wherein both the conspiracy *and* the substantive offense are incorporated.

The Memorandum decision by the Circuit Court does not remove the ambiguities in the statute. Rather, the Court adopted most of the arguments submitted by the government holding that it found nothing in the statute's "scant legislative history" indicating that the interstate commerce and monetary threshold elements prove anything other than a "jurisdictional basis intention." In doing so, the Court ignored the text of the statute which, when read literally, requires both the intent and knowledge of the petitioner in order to obtain a conviction.

Since Congress did not choose to prohibit mere possession of tainted credit cards and evidence of mere possession is not proof of a conspiracy to transact, the evidence adduced against Eboli was therefore insufficient to convict him of a violation of the statute.*

*In this connection, the Circuit Court made erroneous references to both the trial court's instructions to the jury and to the proof adduced at trial. The Court wrote at p. 5068 as follows:

> "In any event, Eboli has no cause to complain in this case because the district judge instructed the jury that it had to find Eboli knew the cards had a credit limit in excess of $1000 and could be used to require at least $1000 worth of goods of services. And, clearly, there was sufficient evidence

(Footnote continued on next page)

II. IN HOLDING THAT A CREDIT CARD SLIP IS A DOCUMENT WITHIN THE SCOPE OF 18 U.S.C. 1014, THE PETITIONERS' DUE PROCESS RIGHTS WERE VIOLATED BY THEIR CONVICTION OF AN ALLEGED VIOLATION OF 18 U.S.C. 371.

§18 U.S.C. 1014 reads in pertinent part:

"Whoever knowingly makes any false statement or report . . . for the purpose of influencing in any way . . . any bank deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years or both."

The elements required for a conviction under this section include knowledge of the falsity of the statement or application, or intent to influence action by a financial institution concerning a loan or one of the other listed transactions listed in the statute. [*U.S. v. Erskine*, 588 F.2d 721 (9th Cir. 1978)]

(Footnote continued from preceeding page)

to support a finding that Eboli knew that the cards he sold could be used to obtain over $1000 in goods or services."

By letter, dated July 12, 1983, the government acknowledged this error in the Court's Memorandum decision. There was no specific charge that to find him guilty the jury must find that Eboli knew the precise credit limit of the counterfeit cards, nor "did the government present evidence of such knowledge." The Court charged, rather, that Eboli must be found to have knowingly and wilfully become a member of the conspiracy whose object was to "use the credit card to obtain money, goods, services or anything of value." (1879-1882)

The petitioners argued in the court below that the mere execution and/or use of the credit card slips is insufficient to establish that there was an intent to influence a bank's decision since the slip is not one of the documents specifically referred to in the language of the statute. [See Appellants' Br., 18] The purpose of that section is to "cover all undertakings which might subject the FDIC insured bank to a risk of loss." Since the testimony of the Director of National Accounts in the Master Card-Visa Merchant Division of Chemical Bank established that the ultimate responsibility for the use of a forged, lost or stolen credit card is the merchant's, the prohibition against the use of various listed documents to "influence" a bank does not therefore include the credit card slips which do not subject the bank to any risk of loss. [See *U.S. v. Stoddart*, 574 F.2d 1050, 10th Cir. 1978; *U.S. v. Mallouf*, 514, F.Supp. 851 (E.D.N.Y. 1981)]

The government argued in the court below that the merchant's ultimate liability "hardly protects" Chemical Bank from a risk of loss. In citing *U.S. v. Helgesen, supra*, 221-223, the government submitted that this statute has been held applicable to "this type of credit card scheme."

Again, the Circuit Court adopted the government's arguments. The Court incorrectly held that this argument was raised for the first time on appeal and adopted the government's argument. [See Appellee's Br., 44] The petitioners argued both at the trial (1588-1590) and in the appeal itself that a credit card slip is not one of the documents described by the

statute. The Circuit Court did not address this issue at all.*

Instead, the Court dwelled on the conspiracy charge submitted to the jury and ignored the argument herein cited which, if correct, establishes that the government failed to sustain its burden in proving that the petitioners committed the acts alleged in Count 1 of the Indictment. As was previously discussed above, this issue has also not been directly addressed by either the court below or any other Federal court. Since there has been such a proliferation of prosecutions under this (and other related statutes), both the government and defense counsel require clarification by this Court with respect to this statute as well.

III. INASMUCH AS THE GOVERNMENT FAILED TO SUSTAIN ITS BURDEN OF PROVING THAT THE USE OF THE WIRE COMMUNICATION WAS AN ESSENTIAL INGREDIENT OF ANY SCHEME TO DEFRAUD THE CHEMICAL BANK, THE PETITIONER DE BIASI'S CONVICTION OF A VIOLATION OF 18 U.S.C. 1343 CONSTITUTES A VIOLATION OF HIS DUE PROCESS RIGHTS.

The "wire fraud" statute reads as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to

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* The indictment charged in Count 1 that both petitioners engaged in a criminal conspiracy 18 U.S.C. 371 by violating 18 U.S.C. 1014 and 18 U.S.C. 1373.

be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both." (Sec 18 U.S.C. 1343)

The evidence adduced at trial against the petitioner De Biasi was minimal at best. There was testimony that he executed two of the forged credit card slips; that he handled some credit card slips in the presence of the government informer (Frappollo) in 1980; that he was with Eboli on two occasions in the presence of Verrastro after the latter had allegedly delivered cards to Eboli; and that he was the owner of a green Cadillac possibly similar to the one that Verrastro was seen in on a day that credit cards were allegedly delivered to Eboli.

It was the government's burden to establish *inter alia* that De Biasi knew that Frappollo (the "merchant") would eventually seek an authorization for the slips and, further, that he was aware that the securing of this authorization was a "familiar and customary part of the way a merchant processed charge transactions and obtained revenue". [*U.S. v. Maze*, 4114 U.S. 395 (1974); *U.S. v. Huber*, 603 F.2d 387 (2nd Cir. 1979)]

In the Court below, the government relied on *U.S. v. Muni*, 668 F.2d 87, 89-90 (2nd Cir. 1981) in arguing that both "common sense" and "common knowledge" dictated that he could have reasonably foreseen that an authorization call would be made by Frappollo which would in turn precipitate an interstate wire connection. [See Appellee's Br., 27] While acknowledging that De Biasi was "*one step farther away* in the com-

munication chain than was the defendant in *Muni* . . . the government submitted that the evidence was "equally strong that he reasonably could have foreseen that an authorization call would be made." [See Appellee's Br., 27]

Once again, the Circuit Court adopted *in toto* the government's arguments and, in fact, cited *Muni* as its authority in discussing the concept of "reasonable foreseeability." (5069-5070) In doing so, the Circuit Court ignored the prevailing facts in *Muni* which established that the defendant regularly telephoned Chemical Bank for an authorization code and that he (as a signatory of the Standard Merchant agreement with Chemical Bank) was familiar with the scanning process by the bank that issued the credit, the utilization of the authorization code, and the communication by the authorization clerk to the merchant. Unlike *Muni*, De Biasi was not a merchant and did not place any telephone call either to Frappollo or any other person in connection with the credit card slips so that it does not inferentially follow that mere handling of the slips, or even their execution, necessarily meant that an authorization call would be made with respect to those slips and that such a call was central to the fraudulent scheme.*

Moreover, the two credit card slips which form the basis of De Biasi's conviction did not contain any

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*In fact, there was evidence that phony merchants (such as Frappollo's predecessor Jacob Palmyrna) engaged in a credit card scheme at the same store without obtaining telephone authorization from the banks (849-860).

"merchant number" so that the government witness (Mr. Spatolla) could not testify as to whether or not any interstate telephone call was made at all. (264)

Therefore, in affirming De Biasi's conviction, the Court held that "common knowledge that the authorization process entailed an interstate computer check" was a sufficient basis, in lieu of evidence (such as that adduced in *Muni*) to sustain a judgment of conviction under this statute. Again, there are no cases in this jurisdiction which discuss the criminal responsibility of the subject defendant who is not a merchant and who is not directly engaged in the authorization process so that a clarifiction of that issue is required by this Court.

CONCLUSION

For the foregoing reasons, petitioners John Mario Eboli and Anthony De Biasi respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: September 30, 1983

Respectfully submitted,

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APPENDIX "A"
MEMORANDUM DECISION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1383 and 1384—August Term, 1982

(Argued June 1, 1983 Decided July 5, 1983)

Docket Nos. 83-1074 and 83-1075

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

ANTHONY DE BIASI and JOHN MARIO EBOLI,

Defendants-Appellants.

Before:

KAUFMAN, PRATT, and GIBSON,*

Circuit Judges.

Appeal by defendants from judgments of conviction for conspiracy to commit bank and wire fraud, con-

* Of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

spiracy to use counterfeit credit cards, and bank and wire fraud. The judgments of conviction were entered in the United States District Court for the Eastern District of New York (Judge Jacob Mishler) following an eight-day jury trial.

Affirmed.

UNITED STATES ATTORNEY, Eastern District of New York, Brooklyn, New York. (Raymond J. Dearie, Jane Simkin Smith, Assistant United States Attorney, *of Counsel*), *for the Appellee.*

KOOPERSMITH, FEIGENBAUM & POTRUCH, Lake Success, New York. (Alexander Potruch), *for Defendant-Appellant De Biasi.*

MARVYN M. KORNBERG, Kew Gardens, New York. (Marvyn M. Kornberg), *for Defendant-Appellant Eboli.*

GIBSON, *Circuit Judge:*

John Eboli and Anthony De Biasi were convicted after a jury trial on one general count of conspiring to commit bank and wire fraud through the use of counterfeit credit cards. (18 U.S.C. §§ 371, 1014, 1343 (1976)). Defendant Eboli was also convicted on eighteen counts of conspiring to use counterfeit credit cards (15 U.S.C. § 1644(a)); and

defendant De Biasi was convicted on two counts of wire fraud (18 U.S.C. § 1343). On appeal, Eboli challenges the propriety of the court's charge and the sufficiency of the evidence to support his conviction for conspiracy to use counterfeit credit cards under 15 U.S.C. § 1644(a). De Biasi makes similar challenges to his wire fraud convictions under 18 U.S.C. § 1343. Both defendants challenge the court's charge on the general conspiracy count and a variety of evidentiary rulings, and complain of prosecutorial misconduct. Finally, Eboli attacks the court's failure to suppress evidence seized as a result of an allegedly illegal search and seizure. We reject all of these claims, finding most of them to be frivolous; hence, we affirm the judgments of convictions.

I. *Facts*

The evidence presented at trial revealed that between 1980 and 1982 Eboli and De Biasi supplied coconspirator Peter Frappollo, a storekeeper, with numerous counterfeit credit card sales slips and counterfeit credit cards. Frappollo turned paid informant in 1981 after being confronted by postal inspectors regarding his fraudulent use of counterfeit credit card slips. Frappollo received immunity from prosecution and became the government's main witness at the trial of Eboli and De Biasi.

A. *Counterfeit Credit Card Sales Slips*

In 1980, Frappollo, co-owner of the Vanilla Country Store, a retail establishment in Rocky Point, New York, was party to a Merchant's Agreement with Chemical Bank under which Frappollo was authorized to accept VISA and MasterCard cards in payment of purchases at

the store. Seizing upon this relationship with Chemical Bank, Frappollo entered into a scheme with his friend John Verrastro, involving counterfeit credit card sales slips. Frappollo would give blank credit card sales slips to Verrastro, who would turn the slips over to a supplier and for $60 per slip acquire slips imprinted with a card number, cardholder name and cardholder signature. Verrastro would return the imprinted slips to Frappollo, who would fill in purchase amounts, telephone for and receive authorization from Chemical Bank, deposit the slips in his account, and then withdraw the funds and split the proceeds with Verrastro.

Verrastro told Frappollo that Eboli was the supplier of the imprinted slips. Frappollo also received slips directly from Eboli. Frappollo testified that on one occasion he met Eboli at a candy store and gave him blank slips. Eboli handed the slips to De Biasi who went to the back of the store and returned fifteen minutes later with ten slips imprinted with a customer number, name, and signature.

Frappollo continued making fraudulent deposits of the imprinted slips supplied by Verrastro, Eboli and De Biasi until December 1980, when Chemical Bank closed the Vanilla Country Store account. Expert testimony established that these slips were imprinted with counterfeit cards. None of the true cardholders whose card number, name, and signature on the counterfeit slips identified in the eight wire fraud counts had ever purchased anything from Vanilla Country Store or had authorized anyone to sign his signature on a sales slip. Five of the customer signatures appearing on the counterfeit slips deposited by Frappollo were positively identified as having been written by Eboli and four by De Biasi.

Two of the slips written by De Biasi formed the basis for his conviction on two wire fraud counts. With respect to these two slips, Frappollo testified that he telephoned the Chemical Bank Authorization Center ("CBAC") in Lake Success, New York, and received authorization for MasterCard purchases in excess of the applicable "floor limit" of $50.[1] CBAC authorization logs confirmed that a CBAC clerk received electronic authorization for the sales slips from the MasterCard facility in St. Louis, Missouri. This authorization was made over leased telephone lines connecting CBAC in New York and the MasterCard facility in St. Louis, Missouri.

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[1] The Merchant Agreement between Vanilla Country Store and Chemical Bank required Frappollo to obtain authorization for purchases in excess of applicable "floor limits" ($50 for a VISA card and $75 for a MasterCard card) by calling the Chemical Bank Authorization Center ("CBAC") in Lake Success, New York. The authorization clerk at CBAC would ask for the caller's merchant number, the number and expiration date of the credit card, and the amount of the sale. This information would be fed into Chemical Bank's computer to ascertain whether the credit card had been issued by Chemical Bank. If it had, the computer would scan its own files to determine whether the transaction should be accepted or rejected; accepted transactions were given an authorization code, which the clerk would communicate orally to the merchant for recording on the sales slip. If the card had not been issued by Chemical Bank, the computer at CBAC would send electronic inquiry over leased telephone lines to either the VISA facilities at McLean, Virginia, or San Mateo, California, or the MasterCard facility at St. Louis, Missouri. These facilities would initiate a scanning process by the bank that issued the card and, if the transaction was approved, an authorization code would be transmitted back over leased telephone lines to CBAC and communicated by the authorization clerk to the merchant. The merchant would place the authorization code number on the credit sales invoice. The sales slips would then be deposited in the merchant's account and would be treated as a cash deposit available for immediate withdrawal. A permanent record of all credit card related inquiries and their results is maintained in the form of daily authorization logs at both the CBAC and at the MasterCard facility at St. Louis.

B. *Counterfeit Credit Cards*

In February, 1982, Frappollo, cooperating with Postal Office inspectors, renewed his contacts with Verrastro in an effort to obtain counterfeit credit cards. On five separate occasions between February 23 and the arrests of Verrastro and Eboli on May 7, 1982, Verrastro sold Frappollo counterfeit cards; in all Verrastro sold Frappollo over fifty counterfeit cards. Evidence proving Eboli supplied Verrastro with the cards on at least four of these occasions was demonstrated through an interweave of tape recordings of conversations between Frappollo and Verrastro, telephone company records of calls made between Verrastro's and Eboli's homes, surveillance, and fingerprint evidence showing Eboli's right thumb and right index fingerprints appeared on a white piece of paper containing ten counterfeit cards.

The final counterfeit credit card sale on May 7, 1982, was preceded by three conversations between Frappollo and Verrastro discussing purchasing arrangements, and three calls from Verrastro's home to Eboli's home. On May 7, Frappollo, under postal inspector's supervision, arrived at Verrastro's home with eighteen marked $100 bills. Verrastro delivered twenty counterfeit cards to Frappollo in exchange for $1,500. Verrastro told Frappollo that he would transfer the money to his source and instructed Frappollo to return with the remainder of the purchase price of $1,700. Later, surveillance officers observed Verrastro meeting Eboli. After Verrastro and Eboli parted company, the officers arrested Eboli. A subsequent search revealed nine of the marked $100 bills Frappollo had earlier given to Verrastro and a counterfeit Chemical Bank MasterCard. This credit card was compared with the others Frappollo had received from Verrastro that day

and it was determined that they were all made by the same counterfeit plate.

C. *The Defense*

Eboli's defense basically consisted of his own testimony that although he both received the phone calls from Verrastro reflected in the telephone records and met Verrastro each of the times he had been observed by surveillance officers, he was merely "settling up" gambling debts that Verrastro owed him. During sentencing, the trial judge concluded that Eboli's testimony was perjurious. De Biasi called one witness, a sales manager who sold De Biasi a green Cadillac that had a green roof. This evidence was introduced to negate the inference that Verrastro had entered De Biasi's Cadillac on March 30 to obtain the counterfeit credit cards since the surveilling officer who had observed that transaction testified the Cadillac Verrastro entered had a black vinyl top.

II. *15 U.S.C.§ 1644(a): Fraudulent Use of Credit Cards*

Recognizing the overwhelming evidence showing that he knowingly conspired to supply counterfeit credit cards to obtain money, defendant Eboli contends that the evidence failed to show and the trial count failed to charge, pursuant to 15 U.S.C. § 1644(a)[2] that he knew or should

2 15 U.S.C. § 1644 provides, in pertinent part:

(a) Whoever knowingly in a transaction affecting interstate or foreign commerce, uses or attempts or conspires to use any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain money, goods, services, or anything else of value which within any one-year period has a value aggregating $1,000 or more . . .

. . .

(f) . . . shall be fined not more than $10,000 or imprisoned not more than 10 years, or both.

have known that each counterfeit credit card had a credit limit in excess of $1,000 and that he specifically intended that each card be used to obtain more than $1,000 in a single transaction affecting interstate commerce.

We reject this contention and conclude that the interstate commerce and the $1,000 monetary threshold elements of § 1644(a) are solely jurisdictional and need not be in the mind of a defendant, such as Eboli, who knowingly joins a conspiracy which envisioned the maximum use of each counterfeit credit card, where each counterfeit card could in fact be used to obtain over $1,000 in goods and services and would necessarily affect interstate commerce. *Cf. United States v. Feola*, 420 U.S. 671, 684-85, 696 (1975) (knowlege of purely jurisdictional facts required for neither substantive offense of assaulting a federal officer nor conspiracy to commit the substantive offense). It is the agreement that particular cards whose credit limit exceeds $1,000 would ultimately be used in transactions affecting interstate commerce to obtain as much money as possible by the merchant purchaser, standing alone, that gives rise to a sufficient threat to interstate transactions as to trigger federal jurisdiction. The defendant's intent and knowledge with respect to the interstate commerce and $1,000 monetary requirements are simply irrelevant to whether such federal jurisdiction exists. As the Court expressed in *Feola:* "The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum." *Id.* at 685.

We can find nothing in text of § 1644(a), its purpose or its scant legislative history indicating that the interstate commerce and $1,000 monetary threshold elements serve other than a jurisdictional basis function. Other courts,

interpreting statutes containing language similar to that contained in § 1644(a), have held that the interstate commerce element is purely jurisdictional and thus does not require that the defendant either intend or know that interstate commerce will be affected. *United States v. Squires*, 581 F.2d 408, 409-10 (4th Cir. 1978) (National Stolen Property Act, 18 U.S.C. § 2314); *United States v. Newson*, 531 F.2d 979, 981 (10th Cir. 1976) (interstate transportation of forged securities); *Unites States v. Muncy*, 526 F.2d 1261, 1264 (5th Cir. 1974) (interstate transportation of stolen goods).

Moreover, we are mindful that the obvious Congressional purpose behind 15 U.S.C. § 1644(a) was to provide consumers and businesses with additional protection from the staggering losses occasioned by the fraudulent use of credit cards. *See United States v. Lomax*, 598 F.2d 582, 583-84 (10th Cir. 1979).[3] Although the interstate commerce requirement is obviously necessary in order to assert federal jurisdiction, we agree with the court's conclusion in *Lomax* that Congress intended to use its broadest constitutional powers to punish fraudulent credit card uses affecting interstate commerce. *Id.* at 584.

Given this purpose, it is also reasonable to assume that Congress imposed the monetary limit to protect the federal justice system from becoming inundated with prose-

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3 In his dissent in *United States v. Maze*, 414 U.S. 395, 416 (1974), Justice White referred to the extent of credit card losses in the United States:

> In this era of the "cashless" society, Americans are increasingly resorting to the use of credit cards in their day-to-day consumer purchases. Today well over 300 million credit cards are in circulation, and annual charges exceed $60 billion. In 1969 alone, 1.5 million credit cards were lost or stolen, resulting in fraud losses exceeding $100 million. 115 Cong. Rec. 38987 (1969). Current estimates of annual credit card fraud losses are put as high as $200 million.

cutions of frauds involving small amounts of money, frauds which could be readily handled by state courts.[4] Also, a similarly worded monetary threshold requirement contained in the National Stolen Property Act (18 U.S.C. § 2314) has been viewed as purely jurisdictional. *See United States v. Roselli*, 432 F.2d 879, 892 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971).

We therefore cannot agree with Eboli that the $1,000 monetary threshold in § 1644(a) was designed to impose the additional *scienter* requirement that the defendant know that the counterfeit credit cards could be used to acquire at least $1,000. In any event, Eboli has no cause to complain in this case because the district judge instructed the jury that it had to find Eboli knew the cards had a credit limit in excess of $1,000 and could be used to acquire at least $1,000 worth of goods or services. And, clearly there was sufficient evidence to support a finding that Eboli knew that the cards he sold could be used to obtain over $1,000 in goods or services.

III. *18 U.S.C. § 1343: Wire Fraud*

De Biasi challenges the sufficiency of the evidence to support his convictions on the two counts of wire fraud under 18 U.S.C. § 1343. He first claims that with respect to the two sales slips forming the basis for these two counts, there were no interstate communications and the authorization calls Frappollo made to CBAC were local New York calls.

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[4] In 1974, § 1644 was rewritten for the purpose of liberalizing federal assistance to cope with the rapidly expanding credit card frauds. Accordingly, the total value of property received to constitute a violation was reduced from $5,000 to $1,000, and the imprisonment period increased to ten years.

This contention is meritless. Frappollo testified that for each counterfeit slip he received from Verrastro, Eboli, and De Biasi, he made an authorization call to the CBAC in Lake Success, New York. This in turn resulted in an interstate authorization communication between a CBAC clerk in Lake Success, New York, and the MasterCard facility in St. Louis, Missouri. The MasterCard records showed that on October 26, 1980, and on November 16, 1980, a Chemical Bank merchant had requested and received authorization from the Eastern State Bank Card Association for the purchase reflected on the two slips in question. The CBAC authorization logs also revealed that authorization was received from St. Louis for these two slips. While the CBAC authorization logs did not indicate the particular merchant who requested authorization, the authorization approval codes, cardholder numbers, and amounts of purchase appearing on the logs corresponded to the numbers on the two slips, leading the Chemical Bank National Account Director to reasonably conclude that interstate authorization was received for the purported purchases reflected by the two slips.

De Biasi alternatively claims that neither Frappollo's authorization call nor the resultant interstate authorization request was reasonably foreseeable and that obtaining the interstate authorization was not necessary to the fraudulent scheme.

In *United States v. Muni*, 668 F.2d 87, 89-90 (2d Cir. 1981), a case involving the application of the wire fraud statute to a fraudulent credit card scheme where the interstate communication was made by an innocent third party at the local authorization center who received defendant's request for authorization, defendant's responsibility for "causing" the interstate communication required a finding that he reasonably foresaw the inter-

state communication. In finding that the interstate communication was reasonably foreseeable by the defendant Muni, the court reasoned:

> The content of reasonable foreseeability must inevitably keep pace with advances in technology and general awareness of such advances. In this case, we think that the interstate communication by the authorization clerk at CBAC in Lake Success, New York, was reasonably foreseeable by Muni. The common knowledge that VISA and Master Charge cards are issued by banks throughout the country and that computers are used in the authorization process makes it reasonably foreseeable that when a defendant requests authorization with respect to a card not issued by a local bank, an interstate computer check is likely to follow. *Id.* at 90.

While De Biasi was one step farther away from the interstate communication than was the defendant in *Muni*, the evidence here was sufficient to support the jury's finding that he reasonably could have foreseen that an authorization call would be made by Frappollo which, in turn, would result in an interstate wire communication. Since Frappollo bought the slips for $60 a piece, common sense dictates that Frappollo would use the slips for bogus purchases considerably in excess of $60. And while the precise floor limits requiring authorization may not be widely known, it is common knowledge that authorization is required for large purchases. Furthermore, Frappollo testified that when he could not get authorization, he would return the slip and get another slip in return. The jury could certainly infer from this chain of events that De Biasi could reasonably foresee the authorization call and its central role in the fraudulent scheme. *Id.* at

90-91. Finally, like the defendant in *Muni*, once De Biasi became aware that authorization calls were being made, he was charged with the common knowledge that the authorization process entailed an interstate computer check. *Id.* at 90.

IV. *18 U.S.C. § 1014: Conspiracy to Commit Bank Fraud*

The defendants urge two separate grounds for the reversal of their convictions for conspiracy to commit bank and wire fraud. First, they claim for the first time on appeal that they could not be convicted of conspiracy to commit bank fraud under 18 U.S.C. § 1014[5] because the merchant depositor, in this case Frappollo, remains liable for the advances under his Merchant Agreement and thus the fraudulent scheme did not subject the bank to a risk of loss.

This contention is not well taken. Frappollo's possible civil liability for thousands of dollars advanced by Chemical Bank hardly protects Chemical Bank from a risk of loss[6] or precludes a finding that the schemers intended that false statements be made for the purpose of influencing the action of the bank upon the advance of funds to the merchant.

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5 18 U.S.C. § 1014 makes it a crime to:

"knowingly mak[e] any false statement or report, or willfully overvalu[e] any land, property or security, for the purpose of influencing in any way the action of [certain enumerated financial institutions, among them banks whose deposits are insured by the Federal Deposit Insurance Corporation], upon any application, advance, discount, purchase agreement, repurchase agreement, commitment or loan. . . ."

6 As the Chemical Bank Director of National Accounts testified, even though the merchant must legally indemnify the bank for all unqualified slips, if there is no money in the merchant account, the bank must bear the loss.

Second, defendants contend the court erred in its charge on the conspiracy count by failing to charge: (1) that the defendant must have adopted the plan of the conspiracy as his own so that he ultimately had a stake in its outcome; (2) the defendant must have reasonably foreseen that an interstate telephone communication would be used in furtherance of the conspiracy; and (3) the accused intended to influence a bank's decision to loan funds.

Defendants' failure to raise objections to the adequacy of the conspiracy charges given by the trial court precludes them from raising any objection now. Nevertheless, defendants' claims are meritless. The trial court is not required to use "stake in the interest test" language in a conspiracy instruction. *United States v. Rush*, 666 F.2d 10, 12 (2d Cir. 1981). All that is required is that the jury be instructed that, in order to convict, it must find the defendants intended to further or to promote the illicit scheme. *Id.* The trial court clearly did this when it instructed:

> What the government must prove beyond a reasonable doubt, in order to bring the accused into the conspiracy, is that the accused knew the purpose and object of the conspiracy, and knowing that, willfully participated in the conspiracy—help[ed] further the business of the conspiracy, that he did it deliberately, intentionally, not inadvertently, negligently, innocently, but willfully.

Further, the court's charge adequately and comprehensively included all the necessary elements of a conspiracy: the agreement, common objective, acts in furtherance of the objective, and knowledge. Specifically, pursuant to defendants' request, the court charged that to convict

defendants, the jury must find that the defendants willfully entered the conspiracy aware that the purpose and object of the conspiracy was "to make false statements and to overvalue property *for the purpose of influencing the actions of banks* insured by the Federal Deposit Insurance Corporation upon the purchase of VISA and Master Charge sales debts" and "to manufacture and distribute counterfeit credit card sales slips as part of a *scheme to defraud banks involving interstate wire communications or transmissions.*" (Emphasis added). The court then went on in painstaking detail to articulate the conspiracy in which the defendants were charged with having knowingly entered. Although the jury was not instructed that guilt required findings that defendants specifically intended to influence a bank's decision to loan funds and reasonably foresaw the use of an interstate telephone communication to effectuate the fraud, the trial judge did charge that each defendant must have willfully entered and participated in the conspiracy aware that: (1) its object was to influence the action of banks through the making of false statements (the deposit of false and fraudulent credit card sales slips); and (2) the fraud would be carried out, in part, by the authorization request over interstate lines. We therefore conclude that the conspiracy charge was proper.

V. *Evidentiary Rulings*

Defendants raise a host of other challenges to evidentiary rulings. First, Eboli claims the court erred in admitting a surveillance photograph of Eboli that the postal inspector had made reference to during his testimony. The photograph was admitted for the limited purpose of eliminating any inference that the photograph was a

"mug shot." Eboli now contends that he was prejudiced by the unexplained origin of the photo because the jury must have inferred that he was under investigation for unrelated criminal activities.

We believe Eboli's claim of prejudice here is sheer speculation. In any event, Eboli has no cause to claim prejudice because his own counsel, in an attempt to impeach the postal inspector's credibility, elicited testimony from the postal inspector that Eboli was already known to postal inspectors at the start of the investigation.

Second, De Biasi claims the court erred in admitting a July 14, 1982 record from the New York State Department of Motor Vehicles which indicated that Prudential Insurance Company began insuring a 1979 green Cadillac registered to defendant De Biasi on December 29, 1980, and that the car was re-registered on November 20, 1981. The registration expired on November 20, 1982, and as of July 14, 1982, there was no indication that De Biasi had sold the car. This record was admitted in connection with surveillance officers' testimony that Verrastro obtained counterfeit cards from the occupants of a green Cadillac on March 30, 1982. De Biasi claims that the registration record was not probative because it did not reflect that he was the owner of the car on March 30, 1982.

We conclude that the admission of the registration document was proper. From the absence of any record as of July 14 showing a sale of the car, the jury could reasonably infer that De Biasi owned the car on March 30, 1982. Furthermore, given other evidence connecting De Biasi to the sale of counterfeit credit cards, the allegedly "tenuous" connection between the green Cadillac observed on March 30, 1982, and De Biasi really went

to the weight that the jury should have given to the registration record, not to its admissibility.

Third, Eboli contends that the telephone computer print-out records of calls made between Verrastro's home and Eboli's home were inadmissible because they contained only the month and date of each call, and not the year. He suggests that without the year being specified on the print-outs, one cannot be certain when the calls were made, and, thus, the records were irrelevant.

Again, Eboli's claim here really goes to the weight, not the admissibility of the print-out records. Moreover, the suggestion that these records may have reflected phone calls in a year other than 1982 is belied by Eboli's witness stand admission that each of the calls was in fact made in 1982 and the coincidence between the date of the phone call records and the date of the counterfeit credit card transactions. Eboli's claim that the records were prejudicial to his defense is correct insofar as it goes. However, the records were prejudicial to his defense because they were extremely probative, not because they were improperly admitted or unfairly used.

Fourth, Defendants urge that the trial judge abused his discretion under Fed. R. Evid. 702 when he permitted (1) the fingerprint analyst to give his opinion, based upon the portion of Eboli's thumb and index finger leaving prints on the white paper containing the counterfeit cards delivered on February 23, that Eboli touched the paper when it was folded and could not have left such prints had he touched the paper when it was flat, and (2) the Chemical Bank credit card production supervisor to give her opinion, based upon her familiarity with the printing used by Chemical Bank and the disparity between the numbers used by Chemical Bank and those appearing on

a variety of credit card slips deposited by Frappollo, that these slips were imprinted with counterfeit cards.

We view both of these rulings as proper exercises of the trial court's discretion. The opinions of both experts were based entirely upon their areas of special knowledge, were of assistance to the trier of fact, and did not confuse the jury. Also, the jury was properly charged that the experts' testimony was not binding upon them and that they were the ultimate judge of its worth.

Finally, defendants claim that the court erred in failing to strike Frappollo's testimony that the government agreed to "protect him" if he cooperated. Frappollo immediately explained that by "protect him" he meant that he would receive immunity from prosecutions concerning his involvement in the credit card scheme. Nevertheless, Eboli's counsel moved for a mistrial, claiming the jury could infer that Frappollo was being protected from Eboli and De Biasi. Although denying the mistrial motion because Frappollo clearly indicated that he meant protection against prosecution, the trial judge nevertheless was willing to accept De Biasi's counsel's request that he admonish the jury to strike the "protect me" statement. However, after Eboli's counsel protested that such an admonition would only accentuate the statement, De Biasi's counsel withdrew the motion to strike.

In view of the withdrawal of the motion to strike and the failure to seek a curative instruction, defendants' complaint is not cognizable an appeal. Furthermore, we do not believe the court erred in denying the mistrial motion because of Frappollo's statement; the statement here was ambiguous at best, making no reference to any threats made by defendants.

VI. *Prosecutorial Closing Statements*

The numerous prosecutorial statements defendants complain of were either entirely proper or rendered innocuous by the trial judge's curative instructions. First, although the prosecutor stated that "a reasonable doubt is one for which a reason exists," the court immediately corrected her and told the jury that he would define reasonable doubt.

Furthermore, considering that Eboli was acquitted of all the wire fraud counts and that De Biasi was only convicted on those counts related to sales slips on which his handwriting was positively identified, we dismiss as frivolous the claim that defendants were harmed by the prosecutor's erroneous, but immediately corrected statements that Eboli "probably"—instead of "possibly"—signed two additional slips and that De Biasi signed three instead of four slips.

Similarly unfounded is De Biasi's claim that he was prejudiced by the prosecutor's reference to Frappollo's 1981 report that he received counterfeit slips from both Eboli and De Biasi. The court immediately cautioned the jury that the report did not indicate that Frappollo had implicated De Biasi in 1981. More important, however, De Biasi's conviction only on the two wire fraud counts for which there was positive handwriting evidence demonstrates that the jury was not swayed by any misstatements as to the 1981 report.

Finally, we reject defendant's claim that the prosecutor improperly vouched for Frappollo's credibility by pointing out that Frappollo's immunity agreement did not protect him against a perjury prosecution. *See United States v. Ricco*, 549 F.2d 264, 274 (2d Cir.), *cert. denied*,

sub. nom. Indiviglia v. United States, 431 U.S. 905 (1977).

VII. *Probable Cause to Arrest Eboli*

Eboli claims the postal inspector's surveillance officers did not have probable cause to arrest him for his involvement in the fraudulent credit card conspiracy. He suggests that the legitimacy of his arrest depends upon a finding that the officers had probable cause to believe he was carrying counterfeit credit cards at the time of his arrest. He also makes the novel suggestion that the officers should have gotten an arrest warrant as soon as Eboli's fingerprints were discovered on the February 23, 1982 packet of counterfeit cards.

First, probable cause to arrest Frappollo was clearly established by: (1) Frappollo's implication of Eboli as the supplier of sales slips in 1980, (2) surveillance of Eboli with Verrastro on three of the five occasions that Verrastro delivered counterfeit cards to Frappollo in 1982, (3) Eboli's fingerprints on the packet of cards delivered on February 23, 1982, (4) reference to Eboli in conversations between Verrastro and Frappollo as the supplier of the counterfeit cards and (5) records of phone calls betwen Verrastro and Eboli on the dates the sales were arranged. Second, there is no support for Eboli's novel suggestion that he was constitutionally entitled to an arrest the moment there was probable cause to arrest. *Hoffa v. United States*, 385 U.S. 293, 310 (1966); *United States v. Waltzer*, 682 F.2d 370, 373 (2d Cir. 1982). The postal inspectors were under no constitutional duty to call a halt to the investigation and arrest Eboli the moment they received confirmation through the fingerprint evidence that Eboli was invovled in the conspiracy. So long as

probable cause as to his participation existed at time of the arrest, there can be no objection to its timing and no requirement that the arresting officers have probable cause to believe that a search incident to the arrest would reveal fruits of a crime.

Judgments affirmed.

APPENDIX "B"
ORDER DATED AUGUST 30, 1983

UNITED STATES OF AMERICA,

Appellee,

vs.

JOHN MARIO EBOLI and ANTHONY DE BIASI,

Defendants-Appellants.

NOTICE OF MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR CERTIORARI

Motion By: Marvyn M. Kornberg (Atty. for Eboli), Tele. 212-261-4400. Alexander Potruch (Atty. for DeBiasi, Tele. 516-354-0800

Has service been effected? Yes.

Is oral argument desired? No.

Has argument date of appeal been set: A. by scheduling order? No. B. by firm date of argument notice? No.

Judge or agency whose order is being appealed: Second Circuit decision affirming judgment of conviction before Hon. Jacob B. Mishler, District Court, Eastern District.

Brief statement of the relief requested: Stay of Mandate Pending Application for Certiorari Rule 41(b) of Rules of Appellate Procedure.

Opposing Counsel: Allyne R. Ross, Assistant U.S. Attorney, 225 Cadman Plaza, 330-7106, for Raymond Dearie, U.S. Attorney.

Emergency Motions, Motions for Stays and Injunctions Pending Appeal:

Has request for relief been made below? No.

Would expedited appeal eliminate need for this motion? No.

If No, explain why not: Nature of Relief Sought.

Will the parties agree to maintain the status quo until the motion is heard? Yes.

By: s/Alexander Potruch
Alexander Potruch

s/Marvyn M. Kornberg
Marvyn M. Kornberg

Appearing for Anthony DiBiasi
John Mario Eboli
Date August 30, 1983

APPENDIX "C"
ORDER DATED AUGUST 25, 1983

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY DE BIASI and JOHN MARIO EBOLI,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant De Biasi and by counsel for the appellant Eboli,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
by Victoria C. Dalton, Deputy Clerk
s/Victoria C. Dalton